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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ASHRAF YOUSEFF,

Defendant and Appellant.

B204556

(Los Angeles County
Super. Ct. No. BA255830)

APPEAL from a judgment of the Los Angeles Superior Court. Norman J. Shapiro, Judge. Affirmed.

Law Offices of Jeffrey S. Weiss and Jeffrey S. Weiss for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews, Joseph P. Lee, and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ashraf Youseff was convicted of one felony count and two misdemeanor counts of making a false report with a true finding on the special allegation that he intentionally took, damaged, and destroyed property worth more than \$150,000. (Rev. & Tax. Code, §§ 30472, 30480; Pen. Code, § 12022.6, subd. (a)(1).) He was placed on formal probation for three years for the felony count with the sentences on the misdemeanor counts to run concurrently and ordered to perform 300 hours of community service and pay \$199,000 restitution to the California Board of Equalization. Youseff appeals from the felony conviction only, on the grounds the trial court committed evidentiary errors. We affirm.

FACTS

Youseff owned and operated Encino Cigar Company, a licensed distributor of cigars and other tobacco products, from 2000 to 2002. He was required to file a monthly tax return to report any distribution of tobacco products in California and pay any tax due. The tax rate on tobacco products other than cigarettes is determined annually by the State Board of Equalization. Sales of cigarettes are separately taxed and reported. Youseff, through the Encino Cigar Company, reported and paid tax of \$6,985 on the distribution of tobacco products from January 2000 to March 2002.

On May 1, 2002, the Department of Justice and the Board of Equalization conducted a search of Youseff's home and his store in Agoura Hills, called The Liquor Chest, pursuant to a search warrant. Agents found over 100 invoices that appeared to relate to the purchase of cigars and other tobacco products by Encino Cigar Company and The Liquor Chest. Edmond Chan, a State Board of Equalization investigator, issued a subpoena for business records of transactions between Encino Cigar and Harold Levinson Company of New York, a company that sells tobacco products in addition to other things. Chan also obtained documents from United Parcel Service (UPS) showing their cash on deliveries (COD) to Youseff's home. After reviewing all of the invoices and the information received from Harold Levinson and UPS, Chan calculated that Youseff owed, but failed to pay \$611,497 in taxes for the distribution of cigars and other tobacco products.

The matter proceeded to a bench trial during which the People presented testimony and evidence as described above. Youseff did not testify and presented no evidence. However, Youseff established during his cross-examination of Chan that some of the invoices Chan used to calculate the amount of taxes owed improperly included nontobacco related items such as shipping and handling and hats.

DISCUSSION

I. Admission of Untrustworthy Documents

At trial, Youseff objected to the admission of two exhibits—People’s exhibit 3, which included a computer printout from Harold Levinson of its sales to Encino Cigar Company and People’s exhibit 10, which showed the COD items delivered by UPS to Youseff’s home. Along with invoices recovered from the search, the information from exhibit 3 and exhibit 10 was used to derive the amount Chan estimated Youseff owed in back taxes. Because neither exhibit contained actual invoices that showed what was purchased or received, much less what was distributed and subject to tax, Youseff complained those exhibits were untrustworthy. Instead, the documents from Harold Levinson showed the dates of invoices, the invoice numbers, and the amounts on the invoices. Since Harold Levinson also sold candy, coffee, and beverages, the invoices could include transactions for these nontobacco related products. Likewise, the UPS document failed to list the contents of the deliveries. UPS provided a list of COD deliveries, including the name of the shipper and the amount to be collected. While many of the shipments were from a company called House of Oxford, which sells various tobacco products including cigars, and other COD vendors had the words “cigars” or “cigar distributors” as part of their name, there was no guarantee each and every COD transaction was for cigars or other tobacco-related products.

In particular, Youseff argued the exhibits do not comply with the business records hearsay exception under Evidence Code sections 1271, subdivisions (b) and (d), and 1562. As a result, it was error for the trial court to admit them. At trial, Youseff’s counsel explained, “All we have is just computer-generated documents that lists [*sic*]

invoice numbers. We don't know what's on those invoices. We don't know what's contained in those documents. I think those are improper, incomplete records."

The trial court admitted exhibits 3 and 10 over counsel's objection, finding "that, based on the method of preparation of these documents and the way they came to the court, the court feels that they bear sufficient reliability that the court can accept them as matters of the truth for the purpose of this hearing." Among other things, the trial court relied on the declaration of the custodian of records for Harold Levinson, which certified the computer printout as "records of the sale and shipment of cigars and tobacco products, [not including cigarettes] to the Encino Cigar Company [and other entities presumably controlled by Youseff not subject to this matter.]" The custodian of records further certified that the records were made in the regular course of business at or near the time of the event and are "a fair and accurate presentation of the sales of cigar and tobacco products made by Harold Levinson Associates, Inc. to the above-referenced customers from January 2000 through July 2002."

A document is admissible under the business records exception of the hearsay rule if "[t]he writing was made in the regular course of a business; [¶] . . . [t]he writing was made at or near the time of the act, condition, or event; [¶] . . . [t]he custodian...testifies to its identity and the mode of its preparation; and [¶] . . . [t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271.) The proponent of evidence has the burden of establishing trustworthiness. (*People v. Diaz* (1992) 3 Cal.4th 495, 535.) A trial court has "wide discretion in determining whether sufficient foundation is laid to qualify evidence as a business record. On appeal, evidence of that discretion can be overturned only upon a clear showing of abuse." (*People v. Lugashi* (1988) 205 Cal.App.3d 632, 638-639.) We find no such abuse of discretion here. Here, a sufficient foundation was laid to establish the trustworthiness of exhibits 3 and 10. That the exhibits may have included nontobacco related transactions goes to the weight of the evidence, rather than its trustworthiness.

In any event, it appears the trial court disregarded the information in exhibits 3 and 10 in rendering its decision. Defense counsel presented its own exhibit J, which showed Youseff's tax liability to be \$42,694 for the year 2000 (count 1), \$24,689 for the year 2001 (count 2) and \$11,093 for the year 2002 (count 3). Tax evasion is only a felony if the amount of tax liability in a 12-month period is over \$25,000. (Rev. & Tax. Code, § 30480.) Because the trial court found count 1 to be a felony and reduced the remaining two counts to misdemeanors, it appears the trial court did not take into account the tax liability incurred from exhibits 3 and 10. Accordingly, any error is harmless.

II. Violation of Sixth Amendment Right To Confrontation

Youseff also contends his United States Constitution Sixth Amendment right to confrontation was violated since he was not able to confront any witness to determine what the items listed in exhibit 3 and exhibit 10 contained. As an initial matter, the People note that Youseff failed to make this objection below. Since we cannot find any such trial objection from our review of the record and Youseff does not point us to any, the matter is waived. (Evid. Code, § 353; *People v. Peterson* (1967) 251 Cal.App.2d 676, 680.)

In any case, we are not persuaded that the exhibits in question are testimonial statements as classified in *Crawford v. Washington* (2004) 541 U.S. 36. Youseff argues that “the records provided in Exhibits ‘3’ and ‘10’ were prepared with an eye toward trial and specifically for use in the criminal prosecution since they were a computer run put together from other documents, none of which appeared to be the actual invoices, and thereby [Youseff was] prohibited from cross-examining any person or persons as it applies to those records.” Simply because a document was created in response to a subpoena duces tecum from information gathered and kept in the ordinary course of business does not automatically mean it was produced “with an eye toward trial.” In fact, it is a compilation of records existing before trial was contemplated.

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.